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No. 252

Supreme Court of the United States

October Term, 1959

JOSEPH D. MASTERSON,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

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No. 252

JOSEPH D. MASTERSON,

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THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent prays that the Petition for Writ of Certiorari presented by petitioner to review a judgment of the United States Court of Appeals for the Third Circuit, which affirmed a judgment of the United States District Court for the Western District of Pennsylvania, be denied.

Opinions Below

The opinion of the District Court is reported at 169 F. Supp., 435. The opinion of the Court of Appeals is reported at 266 Fed. 2d, 1.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Where petitioner's request for a charge on res ipsa loquitur was inconsistent with petitioner's pleadings, with his deposition, with petitioner's position at pre-trial, and with all of the evidence at the trial concerning the cause of his injury, did the Trial Court err in refusing said point for charge?

2. Where the only evidence of respondent's violation of the Safety Appliance Act was petitioner's positive testimony that he was struck by a piece of flying brake shoe, and petitioner concedes that the case was properly submitted to the jury under the Safety Appliance Act, can petitioner, after verdict for respondent, complain of the Court's refusal to charge the jury on res ipsa loquitur, based upon petitioner's belated claim that the cause of his injury may have been something other than a piece of brake shoe?

3. Where a jury returned its verdict for respondent only after additional instructions on the applicable law, to which no exception was taken by petitioner, and petitioner on motion for new trial did not contend that the verdict was against the evidence or the law as given by the Court, can petitioner complain of the jury's verdict on the basis of a question asked prior to the additional instructions?

Statutes Involved

The statutes involved are the Federal Employers Liability Act, as amended (45 U. S. C. A., § 51-60), and the Federal Safety Appliance Act, (45 U. S. C. A., § 11), the pertinent texts of which are set forth at page 3 of the Petition for Writ of Certiorari.

Statement

On the night of December 5, 1956, petitioner, a brakeman in the employ of the New York Central Railroad, sustained injury which gave rise to the instant action, brought under the Federal Employers Liability Act, 45 U. S. C., § 51-60, and the Safety Appliance Act, 45 U. S. C., § 1-16.

While sitting at the north side of the caboose, with his head out the window, looking over his train as it moved westwardly at a 10-mile per hour speed through the Buffalo yards, petitioner sustained a laceration in the region of his right temple from a flying object, and fell back into the caboose unconscious. Immediately after the accident petitioner was taken to Millard Fillmore Hospital, at Buffalo, where he was treated for the laceration and for concussion, and discharged after four days. About a week later, and again in January, 1957, petitioner was admitted to St. Vincent's Hospital, at Erie, for tests. Up to the time of trial, approximately a year and a half after the accident, petitioner was never bed-ridden, except for the brief periods of hospitalization above referred to. Several months after the accident petitioner developed a cataract in his right eye, and also claimed after-effects from his head injury, which were open to serious question. By reason of his claim of intermittent headaches and dizzy spells, he never returned to work, although his own neuro-

psychiatric expert admitted that his only clinical finding on examination of petitioner was tenseness and nervousness (T. 125). Petitioner admittedly had been tense and nervous most of his life (65a). Petitioner was never forced to wear glasses, and at the trial testified "I have very good eyes" (69a).

Eight days after the accident, following his return to Erie, petitioner gave a 20-page statement, recorded in question and answer form by an Erie County Court reporter, to a New York Central Claim Agent. Petitioner then stated he did not know what hit him, but when pressed to give his opinion, petitioner replied, "I think it was part of a brake shoe that ricocheted off the rail and hit me" (92a). In response to questions, petitioner also then stated that he did not know of anything defective about the train and that it was operating in good shape (93a).

Claiming "retrograde amnesia" from the accident, petitioner contended that his memory subsequently returned. About two months after the accident, petitioner for the first time said he remembered being hit by a piece of brake shoe. In his complaint filed on June 19, 1957, petitioner alleged in paragraph 3:

> "On or about December 5, 1956, pursuant to the duty he owed this defendant, he was looking out of the side window of the caboose *when suddenly a part of a brake shoe on one of the cars of said train broke and struck him on the forehead above the right eye.*"

In his sworn answer to interrogatories filed December 12, 1957, petitioner stated:

> "The *brake shoe part* come out of the area of either the trailing trucks of the third car, or the lead trucks of the second car from the caboose. Plaintiff will be relied upon to prove such fact."

At his pre-trial deposition given on April 25, 1958, petitioner positively testified that he had been hit by a piece of brake shoe. At the pre-trial conference, a few days before the trial which began on May 27, 1958, petitioner's counsel stated to the Court: "He (plaintiff) will testify to it. He identifies it as a piece of brake shoe" (8a). At pre-trial, petitioner's counsel also informed the Court that he preferred to go ahead on the Safety Appliance Act alone if the Court would charge that the breaking of a brake shoe constituted a violation of the Act (20a).

At trial, petitioner's case on liability rested solely on his own testimony. His evidence was that he saw an object flying out from the region where sparks were flying, at the leading trucks of the second hind car or the trailing trucks of the third hind car—"One hundred feet or so" ahead of him (52a)—it ricocheted on the adjoining track and as it came up he recognized it was a piece of brake shoe, then it hit him and knocked him unconscious (53a).

At the time of the accident, it was a dark, rainy and misty night; there was no moon. There were no moving trains on parallel tracks and no close clearances. The caboose in which petitioner was riding was close to one of the numerous overhead street bridges at the time of petitioner's injury (Respondent's photograph—Exhibit "F"). No foreign object was subsequently found in the caboose, and inspection of the train several hours later revealed no missing or broken brake shoe. Nor did respondent's records show any subsequent repairs having been made to the cars of the particular train.

The Trial Judge affirmed petitioner's points predicated upon a broken brake shoe constituting a violation of the

Safety Appliance Act; and refused petitioner's point, based on res ipsa loquitur. In so doing, the Court commented: "In this case we don't have any evidence of anything other than the brake shoe" (108a), and added: "If he equivocated, and said 'it came from there, but I am not sure whether it is a brake shoe or what it was,' we would have a different thing. He says brake shoe period." Petitioner's counsel made no reply; gave no reason why the point should be affirmed, or why he objected to the Court's ruling; and simply took exception thereto, later on, at the end of the discussion.

The Court at no time intimated that petitioner's counsel was to be in any manner restricted in his summation concerning the effect to be given to petitioner's testimony. Nevertheless, petitioner's counsel in his closing address at no time even suggested that something other than a brake shoe might have caused petitioner's injury. He stated in effect that the Safety Appliance Act—creating absolute liability upon the breaking of a brake shoe—"is the law with which you are to be concerned" (T. 406).

At the conclusion of the Court's charge, when asked whether he had any additional instructions or corrections to make, petitioner's counsel replied in the negative and simply excepted to the refusal of his point on res ipsa.

After deliberating for some time, the jury returned with this question: "If we find the Railroad not negligent, can we still award damages to Mr. Masterson for the reason he was injured while an employee of the Railroad; and they should be held responsible for his injury?" (119a). The Court then reiterated his instructions on the Safety Appliance Act and repeatedly told the jury that the breaking of a brake shoe, as testified to by petitioner, would

entitle him to a verdict without regard to any question of negligence. No exception was taken to the additional instructions on behalf of petitioner. Subsequently the jury returned with a verdict for respondent, upon which judgment was entered.

Petitioner's Motion for New Trial was refused, and the Court of Appeals for the Third Circuit affirmed the action of Judge Joseph P. Willson.

Reasons For Not Granting The Writ

Introductory

It is respectfully submitted that a Writ of Certiorari would be improvidently granted in the instant case for the following reasons:

(1) No important question of federal law, not settled by this Court, has been decided by the Court of Appeals. On the contrary, the proper scope of the res ipsa loquitur rule was decided in *Sweeney vs. Erving*, 228 U. S., 233; 33 S. Ct., 416, recently cited with approval in *Jesionowski vs. B. & M. R. R.*, 329 U. S., 452; 67 S. Ct., 401, where Mr. Justice Black, speaking for the majority of this Court, referred to *Sweeney vs. Erving* as "a decision which cut through the mass of verbiage built around the doctrine of res ipsa loquitur".

(2) No issues are presented, the settlement of which is important to the public as distinguished from the parties here involved. The record in the instant case shows that it was tried exactly as petitioner and his able and experienced counsel—a specialist in the F. E. L. A. field of litigation—wanted it tried. Only after the jury returned its verdict for respondent, has petitioner in turn requested

the Trial Judge, the Court of Appeals, and now this Court, to do what neither petitioner in his testimony nor counsel in his argument, asked the jury to do—disbelieve petitioner's positive identification of the cause of his injury, as a basis for invoking res ipsa loquitur.

(1) Res ipsa loquitur is inconsistent with petitioner's position throughout the trial, and with all of his proof pointing to one specific cause of his injury.

Petitioner's point for charge, based on res ipsa loquitur, was refused by the Trial Judge because, as stated in his opinion denying petitioner's motion for new trial, it was

> "inconsistent with the allegations in the Complaint, as well as inconsistent with the position taken by plaintiff and his experienced and able counsel throughout the trial, and finally because not warranted by the evidence introduced during the trial."

In our Statement, it has already been pointed out that from the time petitioner filed his Complaint up to and including the final summation of his counsel, there was not the slightest deviation from petitioner's original theory—namely, that liability should be imposed upon respondent railroad because petitioner was struck by a piece of flying brake shoe and nothing else, which he saw and identified before it struck him. Not once did petitioner equivocate by saying he "thought" it was a brake shoe; or "it looked like" a brake shoe; or it was his "impression" that it was a brake shoe. Instead, on more than a dozen occasions (33a, 47a, 48a, 49a, 50a, 52a, 53a, 54a) petitioner unequivocally identified by the flying object as from a brake shoe; and also gave a like history to his medical witnesses.

(2) Petitioner's entire case was presented on the basis of a Safety Appliance Act violation alone, pursuant to counsel's pre-trial assurance to the Court.

The pre-trial notes clearly indicate that at that time petitioner's counsel's primary concern, in view of the absence of any precedent, was whether the Trial Judge would hold that if petitioner was struck by a piece of brake shoe, as he claimed, it would constitute a violation of the Safety Appliance Act. This is made crystal clear by the following colloquy at pre-trial (18a):

> "The Court: I assume Mr. Gaines is going to talk about res ipsa.
>
> Mr. Gaines: I am going to claim that it is a violation of the Safety Appliance Act, that there was an inefficient brake.
>
> If the Court please, we shall also have testimony, if need be, that this breaking of the brake shoe was occasioned by a worn-out condition of the brake shoe and which could have been readily ascertained by an inspection. (No such proof was offered by petitioner at the trial.)
>
> *Lawyers have been chastised by the Supreme Court for pleading a violation of the Safety Appliance Act and negligence, that negligence adds nothing whatsoever, because it is absolute. The Supreme Court has taken occasion to chide us.*"

At 19a it shows:

> "Mr. Gaines: The Safety Appliance Act requires a brake to be efficient. The brake shoe is an integral part of the brake mechanism. *A brake shoe comes into contact with a wheel, when there is no occasion for it so to do, and meets the wheel so as to emit sparks and then break off,* is in our view an inefficient brake, within the meaning of the Federal Safety Appliance Act, Section 11."

Again, at 20a, appears the following:

> "The Court: What about the inference of negligence, under res ipsa?

Mr. Gaines: Assuming now that credit be given the plaintiff's story and that the jury finds that this was a piece of a brake shoe which broke off, and if the court charges that if the jury finds it was a piece of a brake shoe this was an efficient brake—

The Court: Do you want to hang your hat on that, on the Safety Appliance Act, rather than negligence under the F. E. L. A.? Is that what you are saying now?

Mr. Gaines: *If your Honor will charge as I have indicated to you, then I would prefer to go ahead on the Safety Appliance Act.* If your Honor is of the view that the breaking of a brake shoe in the circumstances of this case does not constitute—

The Court: I think the breaking of the brake shoe makes it a Safety Appliance Act case. But—

Mr. Gaines: Then I would prefer to move ahead on that."

Finally, at 21a, we find:

"Mr. Sieber: Doesn't the court have to charge on both?

The Court: Not if counsel don't want it, I don't. If you want to submit it on one, I will.

Mr. Gaines: The answer to that, your Honor, lies in this: If the jury believes that it was a piece of a brake shoe which struck him, the plaintiff gains nothing by establishing negligence when the court charges that is a violation of the Safety Appliance Act. All one does in those circumstances is to clutter up a record. *I think the Supreme Court is right when it observes that if it be a Safety Appliance Act case then negligence has no place in this whole matter.*

If the jury disbelieves him, if this was not a piece of a brake shoe, he must fail, patently.

The Court: O. K.

Mr. Illig: That is what it amounts to.

Mr. Gaines: Do I make myself clear?

The Court: He makes positive identification of its being a brake shoe.

Mr. Gaines: That is right. He doesn't say it was anything else."

Despite the unequivocal statements of petitioner's counsel above quoted, petitioner makes the bald assertion, at page 10 of the Petition for Writ:

> "The (Pre-trial) discussion brought no definitive agreement on the matter of res ipsa loquitur."

Petitioner seeks to bolster his contention by quoting the Court's observation, "That depends on testimony; you can't rule on that in advance" (22a); but the record clearly shows that the above statement of the Court immediately followed a discussion as to how petitioner expected to prove his claim of "retrograde amnesia," and was made solely with reference thereto.

It is also stated in the Petition for Writ that at the time of pre-trial neither petitioner nor his counsel knew that in the interview of December 13, 1956, petitioner had ventured the "opinion" that the object which struck him was a piece of a brake shoe. However, the Notes of Pre-Trial Proceedings (23a) indicate the opposite. In fact, petitioner's counsel then showed that he was aware of the exact words uttered by petitioner on December 13, 1956 when he said with reference to the statement then made:

> "Mr. Gaines: He (Petitioner) didn't know what it was, but he says 'I think it was part of a brake shoe'. His mind was beginning to reassert itself." (24a)

The petitioner himself was present in the Court's chambers throughout the pre-trial conference. If a party, speaking thus through his counsel, may—for no reason other than disappointment in an adverse verdict—completely repudiate such positive assurances given to the Trial Judge at pre-trial, then surely the basic purpose of pre-trial procedure has been completely thwarted.

The question asked at page 12 of the Petition for Writ, "Would petitioner thereby be precluded from amending

his position prior to trial?" is purely rhetorical, for, as pointed out by the District Judge in his opinion (121a):

> "At the trial plaintiff's counsel opened to the jury and plaintiff's case was tried on the theory that plaintiff positively identified the object which struck him as part of a brake shoe which came from the trucks under the cars of the train some little distance ahead of the caboose."

Unquestionably, the following practical considerations influenced petitioner and his counsel in trying his case solely under the Safety Appliance Act:

(a) All the jury had to do in order to find for petitioner was to accept his testimony; and both petitioner and his counsel felt that that was a foregone conclusion.

(b) If petitioner's testimony had in any way reflected (as a basis of res ipsa) what is now contended—only after verdict—that his "idea", expressed 8 days after the accident, may have blossomed into an honest, though *wrong*, belief 42 days later, petitioner himself would have thereby invited the jury to speculate on other possible causes of his injury, many of which would not—as would a broken brake shoe—be directly under the exclusive control of the Railroad.

In this connection, it is important to bear in mind that Garn, a fellow trainman, was seated at the opposite side of the caboose from petitioner, also looking out the window. It was evident from Garn's testimony that the caboose at the time of the accident was in the immediate vicinity of one of the two nearest overhead street bridges shown in Respondent's Exhibit "F", reproduced in the Appendix hereto. Petitioner realized that respondent would not be liable if some third person had dropped or thrown an object from a highway bridge, which struck petitioner, or if some

boy had thrown a rock or stone at the passing train, in the absence of additional evidence, lacking in the instant record, pointing to respondent's negligence.

(c) At the trial petitioner sought to enhance his alleged head injury by his claim of "retrograde amnesia". It is significant that the term does not appear even once in petitioner's brief before the Court of Appeals nor in the Petition for Writ of Certiorari addressed to this Court. If petitioner at first didn't know that he was struck by a brake shoe because in fact it was something else (as the jury would be apt to believe, under res ipsa), then, since petitioner couldn't forget what he never knew, his claim of retrograde amnesia—to which a great deal of significance was attributed by his neuro-psychiatric expert—would fall of its own weight, and petitioner's claim for damages would be greatly impaired in the eyes of the jury.

Actually, petitioner's alleged amnesia served a twofold purpose from his standpoint: It not only bore on the question of damages; but it explained why petitioner could positively identify the flying object as a piece of brake shoe, when for some time after the accident he had said he did not know what hit him.

But the pertinent question remains: If petitioner is now sincere in saying that he may have been mistaken as to what hit him (page 8, Petition for Writ), how is this consistent with what he told the doctors—namely, that he at first forgot but subsequently remembered what it was, thereby laying the groundwork for his claim of amnesia? (See opinion of District Court, 121a.)

(3) Where, as here, there was direct and positive evidence of the cause of plaintiff's injury, res ipsa loquitur was inapplicable.

It is settled law that in an admitted res ipsa loquitur situation, if a plaintiff's proofs establish the exact accident cause, no election to rely on res ipsa loquitur is possible. In the leading case of *Sweeney vs. Erving*, 228 U. S., 233, 240; 33 S. Ct., 416, 418, cited in *Jesiownowski vs. B. & M. R. R.*, 329 U. S., 452; 67 S. Ct., 401, the Supreme Court said:

> "In our opinion res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence *where direct evidence of it may be lacking* * * *"

As was pertinently pointed out by the Trial Judge (123a):

> "In the instant case if is obvious, of course, that direct evidence of what caused plaintiff's injury is not lacking. The request as submitted is therefore inconsistent with all of the evidence in plaintiff's case, that is, as to the point where the request says * * * that something which was part of the train * * * struck the plaintiff directly injuring him * * *."

Here petitioner had already unequivocally identified the "something which was part of the train" as a piece of brake shoe; and there was not a scintilla of other evidence, direct or circumstantial, which could give rise to the inference that something other than a brake shoe, in the exclusive control of respondent, caused his injury. On this posture of the record, therefore, there was no room for application of res ipsa, for the reason, as stated in *38 Am. Jur., Negligence, Section 303*:

> "The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference, and the *necessity* for the doctrine does not exist. Being a rule

of necessity, it must be invoked only where evidence is absent and not readily available. It is not to be invoked when the evidence is available, and certainly not when it is actually presented." See 33 A. L. R. 2d, 810.

"Res ipsa loquitur is a procedural rule as to evidence. It is never valid in the face of facts which adequately explain the occurrence.": *Orr vs. Southern Pacific Company*, 226 Fed. 2d, 841 (9).

(4) There was no proof of a Safety Appliance Act violation except petitioner's testimony; hence, if his testimony were as equivocal as now claimed, his case could not have been submitted under the Safety Appliance Act.

In his opinion (123a), the Trial Judge put his finger squarely on the fundamental weakness of petitioner's position, when he said:

"Plaintiff took out of the case the very point which he now claims as error. To disregard plaintiff's identification of the object that struck him, means to engage in mere speculation as to the cause of plaintiff's injury. The result is that the very point which plaintiff now contends should have allowed him to go to the jury under the doctrine of res ipsa, took him to the jury under the Safety Appliance Act."

Solely on the basis of petitioner's positive testimony that a brake shoe caused his injury, petitioner's case was submitted—and correctly so, as petitioner admits—to the jury under the Safety Appliance Act. But if petitioner did not know what struck him, as petitioner now argues in effect, by contending that something other than a brake shoe, in the exclusive control of defendant, may have caused his injury, the jury should not have been permitted to find a violation of the Safety Appliance Act, as it was, under the Court's instructions. Admittedly, apart from petitioner's testimony, there was no other evidence in the case, direct or circumstantial, of any defective safety appliance. In short, if, as petitioner now contends, he could not see

what hit him because the accident happened so suddenly in the darkness, he would have no knowledge where it came from; and there would have been no basis in such event for the Court to have submitted petitioner's case under the Safety Appliance Act.

In fairness to the Trial Judge, under the requirements of Federal Rule 51, it should not be overlooked that at no time subsequent to the pre-trial conference, until after verdict, did petitioner's counsel ever hint at the possibility that petitioner might have been hit by something else, other than a brake shoe, under the exclusive control of respondent. Petitioner's counsel offered no reason whatever why his point under res ipsa (which was utterly inconsistent with his previously stated position) should be affirmed, even after the Court plainly indicated that his ruling on res ipsa would have been different "if he (petitioner) equivocated, and said 'It came from there, but I am not sure whether it is a brake shoe or what it was,' we would have a different thing. He says brake shoe period" (103a). Petitioner's counsel remained silent. The Court had already acquiesced in petitioner's points for charge under the Safety Appliance Act; and petitioner's astute counsel undoubtedly realized that he would be in an untenable position were he to urge res ipsa on the basis of the uncertainty and equivocal nature of petitioner's testimony, since he well realized that petitioner's testimony had to be—as it was—definite and positive concerning a Safety Appliance Act violation, in the absence of any other proof that such violation had occurred.

In *O'Donnell vs. Elgin, J. & E. Ry. Co.*, 338 U. S., 384, 70 S. Ct., 200, as in the case at bar, petitioner in the same paragraph pleaded a violation of both the F. E. L. A. and the Safety Appliance Act. There, petitioner's case

was tried on the theory that the decedent met his death as the result of the breaking of a coupler. In the *O'Donnell* case, as in the case at bar, petitioner's case was submitted to the jury only on the Safety Appliance Act. (See opinion in Court of Appeals, 171 Fed. 2d, 973, 974.) Here, as previously pointed out, petitioner's case was pleaded and tried solely on the theory that a piece of brake shoe caused his injury; but in the *O'Donnell* case, petitioner was not given the benefit of the peremptory instruction that a coupler which broke was a violation of the Safety Appliance Act, which would render the Railroad absolutely liable. Here, on the other hand, the Trial Judge carefully followed the Supreme Court's admonition in the *O'Donnell* case, and clearly so charged the jury.

(5) The mere fact that the jury tried to find a basis on which to compensate the petitioner, aside from the applicable law, is no reason for setting aside its ultimate verdict for respondent.

In connection with petitioner's criticism of the jury's question and the Court's answer thereto, it should be noted initially that petitioner in his motion for new trial did not contend either that the verdict was against the weight of the evidence or against the law as given by the Court.

On petitioner's motion for new trial, respondent, having the verdict, is entitled to have the evidence viewed in the light most favorable to respondent: *Conner vs Pennsylvania Railroad*, 163 Fed. Supp., 718 (Pa.); every fact which might be found or reasonably inferred from the evidence must be regarded as having been found favorably to respondent: *Wild vs. Atlantic Refining Co.*, 195 F. 2d, 151 (3).

Turning now to the question propounded by the jury, one point stands out clearly—the jury was searching for

a way to compensate petitioner. Hence, in view of the jury's sympathetic attitude toward the petitioner thus plainly manifested, it is a fair inference that the jury had already *rejected* petitioner's testimony concerning the cause of his injury or they would have promptly returned a verdict for him on the basis of the railroad's absolute liability under the Safety Appliance Act.

But since there was not even a scintilla of evidence of other negligence or misconduct on the part of the railroad in the entire record, once the jury concluded that the object which struck petitioner was not a part of a brake shoe, there was nothing else before them on which they could predicate any negligence of the respondent. Accordingly, the jury sought advice as to whether, nevertheless, they could find for petitioner on a Workmen's Compensation theory.

The Court then reiterated his previous instructions as to absolute liability imposed by violation of the Safety Appliance Act and stated not once, but twice, that if the brake shoe broke, as petitioner testified, he was entitled to a verdict irrespective of any question of negligence. *Petitioner's interests were protected by his counsel, who was present at the time and who apparently was perfectly satisfied with the Court's instructions since he took no exception to the additional instructions given.* Even had the Court then erred—which, it is submitted, that he did not—it would now be too late for petitioner to complain, since the alleged error would not be reviewable: *Macartney v. Compagnie Generale Trans Atlantique*, 253 F. 2d, 529 (9).

Furthermore, since the jury resumed deliberations *after* the Court's additional instructions, specifically directed to the absolute liability imposed under the Safety Appliance

Act, there is no basis for petitioner's present contention that the jury's ultimate verdict was on the basis of their consideration of negligence.

CONCLUSION

Respondent's position may be summarized as follows:

1. Petitioner's request for a charge on res ipsa loquitur was utterly inconsistent with petitioner's pleadings, with his deposition, with his position as stated at pre-trial, with petitioner's testimony, and with all the evidence at the trial concerning the cause of his injury.

2. Petitioner's counsel indicated most firmly at pre-trial, and in his opening and closing addresses, that he did not *want* to rely on res ipsa loquitur inasmuch as the Court adopted his view that petitioner's testimony would establish a violation of the Safety Appliance Act; now he has reversed himself.

3. Petitioner having established the exact accident cause by his positive identification of a brake shoe as the object which struck him, had no right to invoke the res ipsa loquitur doctrine.

4. Petitioner's case was submitted to the jury under the Safety Appliance Act solely on the basis of petitioner's positive, uncorroborated testimony concerning a specific violation of the Act. Now, by invoking res ipsa, and contending that something else, under the exclusive control of respondent, *may* have caused petitioner's injury, petitioner is taking out of the case the vital element which permitted him to go to the jury under the Safety Appliance Act.

5. Since the jury returned its verdict only after additional instructions on the applicable law, the Safety Appliance Act, to which no exception was taken by petitioner,

petitioner cannot justifiably contend that the jury's ultimate verdict was based on a consideration of negligence.

As the Supreme Court said in *Tennant vs. Peoria & P. U. Railway Co.*, 321 U. S., 29, 64 S. Ct., 409:

> "It is the jury, not the Court, which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing cases.) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because Judges feel that other results are more reasonable."

WHEREFORE, for the foregoing reasons, this appeal should be dismissed.

Respectfully submitted,

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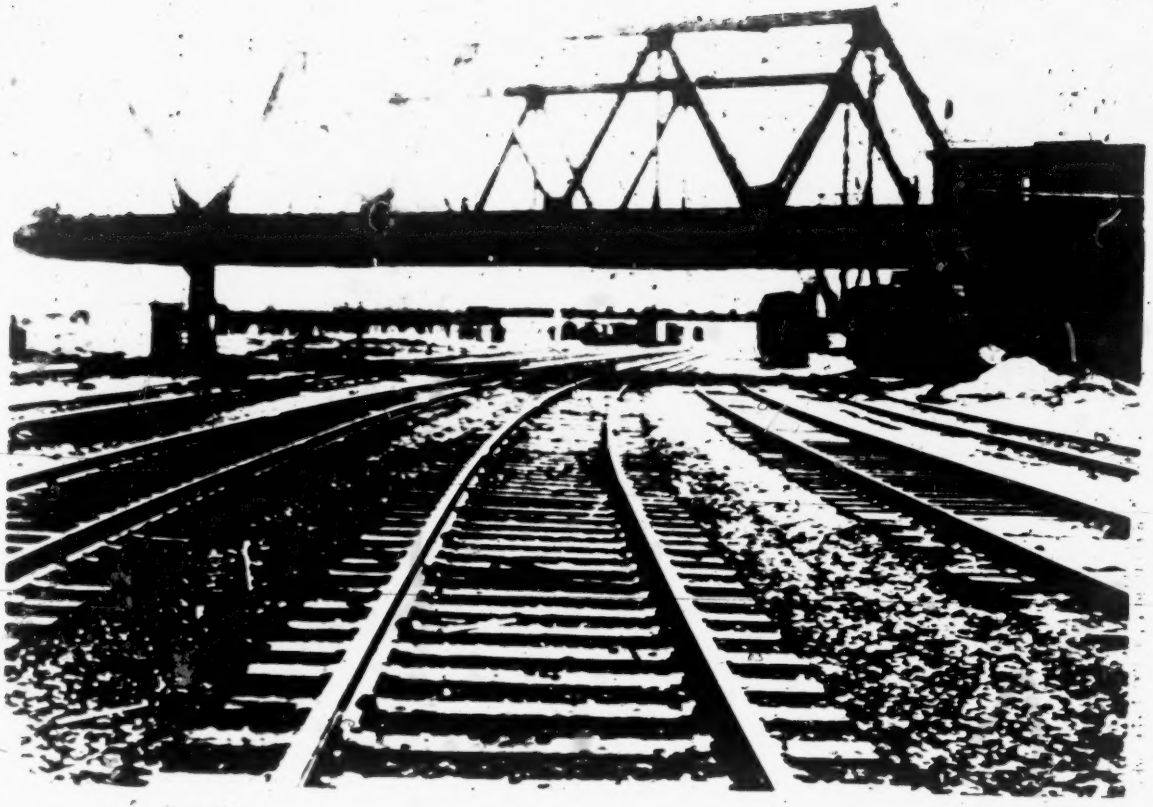
Attorneys for Respondent.



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In the Supreme Court of the United States

No. 252.

OCTOBER TERM, 1959.

JOSEPH D. MASTERSON,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent asserts that petitioner at pre-trial confined his position to a claim of Safety Appliance Act violation, wherefore he precluded himself from relying upon the res ipsa doctrine. Petitioner asserts that there was no definitive agreement or assurance at pre-trial anent the theory upon which the case was to be tried.

At pre-trial, to be sure, there was discussion anent such theories. It was pointed out that the petitioner at trial would identify the object as a piece of a brake shoe. As to whether such identification made it a Safety Appliance Act case, the court said:

> "The Court: Then it is in the case. It might have been something else, which he could go to the jury on, and the railroad has to show—in other words, he goes to the jury on res ipsa.
>
> Mr. Illig: Oh, no, your Honor. I respectfully disagree.

The Court: If he is looking out that car window and he is hurt by a flying object, I think it is up to the railroad to explain. I think he can get to the jury under F.E.L.A.

Mr. Illig: I think we are going to have a legal argument on that.

The Court: You see your friend Justice Brennan at the Judicial Conference and he will go along with that theory. He wrote all those opinions.

Mr. Illig: You spoke about retrograde amnesia. I haven't heard you mention any witnesses that you expect to call to prove this retrograde amnesia.

Mr. Gaines: Dr. Gould.

Mr. Illig: You didn't mention you were calling him.

Mr. Gaines: Yes, I did. I am sure that I did.

Mr. Illig: The only witnesses I have down here are the plaintiff and the hospital records, Dr. Gans, Dr. Joy, and nothing about Dr. Gould.

Mr. Gaines: I mentioned Dr. Gould.

Mr. Illig: You mentioned him, but not as a witness.

Mr. Gaines: I specifically mentioned him. You probably missed it.

The Court: That depends on testimony. You can't rule on that in advance. Anything further, gentlemen? Any information you want, now, Mr. Gaines, from the defendant?" (21a, 22a.)

We submit respectfully that the court's observation, "That depends on testimony. You can't rule on that in advance," referred to the matter of res ipsa, and not to the identity of a medical witness.

Had any specific pre-trial agreement or assurance been made, would not the trial court have reminded petitioner's counsel of such agreement or assurance at the time that petitioner presented the rejected request to charge?

Petitioner's counsel is taken to task by respondent for not insisting aggressively that the trial court give the re-

quested charge on res ipsa. Perhaps counsel might have been more insistent. It seemed clear, however, that nothing was to be gained by pursuing the point more insistently at that juncture. Certainly, failure to be more aggressive was not tantamount to a waiver of error.

Respondent asserts that the trial court did not intimate that petitioner's counsel was to be in any manner restricted in his summation concerning the effect to be given petitioner's testimony. By the trial court's ruling on the requested charge on res ipsa, petitioner's counsel, indeed, was restricted concerning the effect to be given petitioner's testimony.

Respondent argues that petitioner did not "equivocate by saying 'he thought' it was a brake shoe, or 'it looked like' a brake shoe, or 'it was his impression' that it was a brake shoe." In the circumstances of this case, could petitioner's testimony amount to anything more than the equivalent of "I thought" it was a brake shoe, or "it looked like" a brake shoe? Petitioner freely admitted that for some fifty days immediately following the occurrence, he had repeatedly stated that he could not identify the flying object which struck him. Eight days after the occurrence, unrecalled by him, he apparently had given his opinion that it was a part of a brake shoe that struck him. Identification was possible only by impression gained during a fleeting moment under unfavorable conditions of light and weather. There was no opportunity for careful scrutiny.

Clearly, then, any recollection of the flying object necessarily would have to be limited to the equivalent of "I thought" it was a part of a brake shoe or it "looked like" a part of a brake shoe.

Respondent asserts that petitioner's counsel, "in his opening and closing addresses," neither of which appears in the Joint Appendix, indicated that he did not want to

rely on res ipsa loquitur. This is a wholly unwarranted statement. The very fact that petitioner's counsel requested a charge on res ipsa loquitur before argument and summation would seem to be sufficient to show that the statement is without basis in fact.

Respondent argues that the identification by petitioner established the exact accident cause and therefore he had no right to invoke the res ipsa loquitur doctrine.

It was respondent who argued successfully to the jury that petitioner, largely on the basis of his own testimony, had not established the exact cause of the accident by his identification of the object as a piece of a brake shoe.

On the Record in this case, the jury could have found that though not a piece of a brake shoe, the object which struck petitioner came from a part of the train under respondent's exclusive control, and failing an adequate explanation by respondent, the jury could have drawn the inference of respondent's negligence.

The jury, however, was not permitted to weigh the inferences of negligence which could arise from the jury's acceptance of such testimony.

Respondent, in effect, argues that the unsuccessful attempt by petitioner to present by direct testimony the precise cause of his injury estops him from relying on res ipsa loquitur.

The Supreme Court of the United States has never stated any such proposition of law.

We submit that where, as in the case at bar, at the close of all the testimony, the cause of injury does not clearly appear, the petitioner ought not to be estopped from relying upon the doctrine of res ipsa loquitur. In such circumstances, he should have been permitted to argue the case upon the whole testimony, and the trial

court should have charged on res ipsa loquitur in conformity with the trial court's own observation made at pretrial that submission to the jury under both the Safety Appliance Act and res ipsa could be made. (21a.)

Respectfully submitted,

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